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No. 99-986

In the Supreme Court of the United States

DANIEL M. BYRD, III, PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a panel of scientific experts assembled by a private contractor is an "advisory committee" within the meaning of the Federal Advisory Committee Act (FACA), 5 U.S.C. App., where the private contractor rather than a federal agency selected the panel's members, supervised the panel's sole meeting, and authored the report of the panel's deliberations.

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. A1-A17) is reported at 174 F.3d 239. The decision of the district court (Pet. App. B1-B5) is unreported.

JURISDICTION

The court of appeals entered its judgment on April 30, 1999. A petition for rehearing was denied on August 11, 1999. Pet. App. A20. On November 3, 1999, the Chief Justice extended the time within which to file a petition for a writ of certiorari until December 9, 1999, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Advisory Committee Act (FACA), 5 U.S.C. App., regulates committees providing group advice to the Executive Branch. FACA defines an "advisory committee," in part, as:

> any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof * * *, which is—
>
> **(A)** established by statute or reorganization plan, or
>
> **(B)** established or utilized by the President, or
>
> **(C)** established or utilized by one or more agencies, in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government.

5 U.S.C. App. § 3(2) (1994 & Supp. IV 1998).

If an agency "establishe[s] or utilize[s]" an advisory committee, the agency must file a charter setting forth the committee's objectives and the scope of its activities. 5 U.S.C. App. § 9(c). In addition, the agency must provide advance notice in the Federal Register of committee meetings, keep minutes of each meeting, and make committee records available to the public in accordance with the Freedom of Information Act, 5 U.S.C. 552. See 5 U.S.C. App. §§ 10(a)(2), (b) and (c). Committee meetings must be open to the public, and "[i]nterested persons shall be permitted to attend, appear before, or file statements with any advisory committee," unless one of the exceptions enumerated in the Government in the Sunshine Act, 5 U.S.C. 552b(c),

applies. See 5 U.S.C. App. §§ 10(a)(1), (a)(3) and (d). A federal officer must preside over or attend every committee meeting. 5 U.S.C. App. § 10(e). Prior to any meeting, the federal officer must approve the scheduling and agenda of the meeting. 5 U.S.C. App. § 10(f).[1]

2. a. Pursuant to its statutory responsibilities, see 42 U.S.C. 7412(f), respondent Environmental Protection Agency (EPA) collects and evaluates scientific information regarding the health effects of hazardous substances. In 1985, EPA issued an interim report discussing the carcinogenicity of benzene, a common air pollutant known to cause cancer in humans. Pet. App. A2. In the mid-1990s, EPA initiated an update of the report that would take account of more recent data and scientific advances. By 1996, EPA had prepared a draft update of the benzene report. *Ibid.*

Before finalizing the updated report, EPA decided to subject it to external peer review. EPA entered into a contract with a private environmental consulting firm, Eastern Research Group, Inc. (Eastern), to conduct the peer review. Pet. App. A2. Under the contract, Eastern was to select and assemble a panel of qualified experts, organize a public meeting of the panel to discuss EPA's draft, and compile and submit to EPA a report summarizing the panel's review of the draft. *Ibid.* EPA submitted to Eastern a list of potential candidates for the review panel. *Id.* at A2-A3. Eastern

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[1] See also 5 U.S.C. App. §§ 5(b)(2) and (c) (the membership of an advisory committee should be "fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee"); 5 U.S.C. App. § 9(c) ("[n]o advisory committee shall meet or take any action until an advisory committee charter has been filed * * * with the head of the agency to whom any advisory committee reports"). See generally 41 C.F.R. 101-6.1001 to 101-6.1035.

chose four individuals from that list, but also selected two persons, including the chair of the panel, from Eastern's own database of consultants. *Id.* at A3; C.A. App. 220-221, 276. EPA made no effort to modify the list of panel members selected by Eastern, even though the contract gave EPA final authority to approve the panel's membership. *Id.* at A3.

On June 30, 1997, EPA announced in the Federal Register that the Eastern panel would meet on July 16, 1997, and that its meeting would be open to the public. 62 Fed. Reg. 35,172; Pet. App. A3. The notice stated that interested persons could attend and participate in the meeting, and that written comments on the matter could be submitted to EPA for a 60-day period ending August 29, 1997. Pet. App. A3. Eastern managed the panel's meeting on July 16, 1997. *Ibid.* Some EPA employees who had been involved in developing the draft update of the benzene report attended and participated in the meeting, but no EPA employees or officers supervised the conduct of the meeting. *Id.* at A3-A4. Petitioner, a self-employed "consulting toxicologist and risk assessor," also attended the meeting and twice expressed his views to the panel. *Id.* at A4. He subsequently submitted written comments to EPA on the draft benzene update. *Ibid* Although petitioner's request for the panel members' pre-meeting notes was initially denied, *ibid.*, petitioner subsequently obtained those documents as a result of a request he filed in October 1997 under the Freedom of Information Act, 5 U.S.C. 552. Pet. App. A4-A5. At that time, EPA again invited petitioner to submit comments on the draft. *Id.* at A5.

Two months after the meeting, Eastern submitted to EPA its final report summarizing the meeting and its panel's analysis of EPA's draft report. Pet. App. A4-

A5. "EPA did not participate in [Eastern's] preparation of the final report." *Id.* at A5. The panel was then disbanded.

b. In August 1997, petitioner filed suit against EPA alleging that the Eastern panel was an "advisory committee" within the meaning of FACA. Pet. App. A4. The complaint requested a declaratory judgment that the panel was formed and operated in violation of FACA, and an injunction barring EPA from making any use of the Eastern panel's work product. *Ibid.*

The district court dismissed petitioner's action on its merits. Pet. App. B1-B5. "[A]ssum[ing] without deciding" that petitioner had standing (*id.* at B2 n.1), the district court held that the expert panel convened by the private contractor, Eastern, was not a FACA "advisory committee" because EPA neither established the panel nor exercised significant control over its composition, deliberations, or operations. *Id.* at B2-B4 (citing *Public Citizen* v. *Department of Justice*, 491 U.S. 440 (1989), and *Food Chem. News* v. *Young*, 900 F.2d 328 (D.C. Cir.), cert. denied, 498 U.S. 846 (1990)).

3. a. The court of appeals affirmed. Pet. App. A1-A17. By the time the case was on appeal, petitioner had abandoned his claim for injunctive relief, because the panel convened by Eastern had completed its work and ceased its operations. Petitioner continued to press for declaratory relief, however. The court of appeals held that petitioner had standing because he had been injured by the delay in obtaining the panel members' pre-meeting notes. *Id.* at A7. The court reasoned that a declaratory judgment would remedy that injury because "it will provide him with this Court's declaration that the agency failed to comply with FACA; and such a declaration will give [petitioner] 'ammunition for [his] attack on the Committee's findings' in subsequent

agency proceedings that make use of the Benzene Update." *Ibid.* The court also concluded that the case was not moot because EPA has a policy of hiring private contractors to conduct peer-reviews. See *id.* at A8-A9.

On the merits, the court of appeals upheld the district court's conclusion that Eastern's panel was not subject to FACA. Pet. App. A9-A15. The court noted that FACA applies only to bodies "established" or "utilized" by an agency in the interest of obtaining advice or recommendations, 5 U.S.C. App. § 3 (1994 & Supp. IV 1998), and both this Court and the court of appeals have given those terms narrow, specialized meanings. In particular, a panel is "established" by an agency only if the agency itself creates it. Similarly, a panel is "utilized" by an agency only if it is under the agency's strict management and control. See Pet. App. A10-A15 (citing *Public Citizen, supra*; *Animal Legal Defense Fund, Inc.* v. *Shalala*, 104 F.3d 424, 430 (D.C. Cir.), cert. denied, 522 U.S. 949 (1997), and *Washington Legal Found.* v. *Sentencing Comm'n*, 17 F.3d 1446, 1450 (D.C. Cir. 1994)).

Applying those precedents, the court of appeals concluded that Eastern's panel was not "established" by EPA because the panel was formed by Eastern, not EPA. Pet. App. A13 ("The record, however, belies any claim that EPA in fact 'established' the panel as required by FACA."). The court also concluded that EPA had not "utilized" the panel because EPA did not manage or control the panel. The court found that it was Eastern, not EPA, that selected the panel's members, supervised the panel's sole meeting, and drafted the report of the panel's deliberations. See *id.* at A12-A15.

b. Judge Williams concurred in part and dissented in part. Pet. App. A15-A17. Judge Williams agreed that petitioner had standing and that the case was not moot, albeit on the ground that petitioner challenged EPA's general FACA policies, rather than this particular "episode." *Id.* at A16. Judge Williams otherwise disagreed with the panel's rationale both that petitioner's claims regarding this particular committee were not moot and that petitioner had standing to seek purely declaratory relief. *Ibid.* Characterizing the merits as "close" (*id.* at A16, A17), Judge Williams would have held that the peer-review panel was "established" by EPA because, under its contract with Eastern, EPA had retained the power to approve the panel's membership (*id.* at A17).

c. The court of appeals denied a petition for rehearing and suggestion of rehearing en banc. Judges Williams and Tatel would have granted rehearing en banc. Pet. App. A18-A20.

ARGUMENT

The court of appeals' ruling, which applies settled law to the particular facts of this case, is correct and does not conflict with any decision of this Court or any other circuit. Further review therefore is not warranted.

1. a. There is no conflict among the circuits regarding the standard for determining whether an advisory group created by a private contractor is "established" or "utilized" by a government agency, within the meaning of FACA, 5 U.S.C. App. § 3(2) (1994 & Supp. IV 1998). To the contrary, the court of appeals here applied the same settled law governing private contractors that it has for the last ten years. In *Food Chemical News* v. *Young*, 900 F.2d 328 (D.C. Cir.), cert. denied, 498 U.S. 846 (1990), the District of Columbia

Circuit held that an agency does not "establish" a committee unless it is "'a Government-formed advisory committee.'" *Id.* at 332 (quoting *Public Citizen* v. *Department of Justice*, 491 U.S. 440, 458 (1989)). The court also held that an agency does not (under FACA) "utilize" a committee "organized by a nongovernmental entity" unless the committee is "so 'closely tied' to an agency as to be amenable to 'strict management by agency officials.'" *Id.* at 332-333 (quoting *Public Citizen*, 491 U.S. at 457-458, 461); see also *Animal Legal Defense Fund* v. *Shalala*, 104 F.3d 424, 427, 430 (D.C. Cir.) ("the term 'utilized' was given a very narrow interpretation by the Supreme Court in *Public Citizen*," requiring "*actual management or control* of the advisory committee"), cert. denied, 522 U.S. 949 (1997); *Washington Legal Found.* v. *Sentencing Comm'n*, 17 F.3d 1446, 1450-1451 (D.C. Cir. 1994) (committee created by the Sentencing Commission (a governmental body not subject to FACA) was not "utilized" by the Department of Justice because "utilized * * * is a stringent standard, denoting something along the lines of actual management or control of the advisory committee"; reiterating that the group must be "so closely tied to an agency as to be amenable to strict management by agency officials").

b. Nor does the court of appeals' decision conflict with this Court's precedent, as petitioner acknowledges (Pet. 11). To the contrary, in *Public Citizen* v. *Department of Justice*, *supra*, this Court held that the terms "established" and "utilized" in FACA have a particular, circumscribed meaning. 491 U.S. at 452-467. The Court ruled that a panel yielding advice or recommendations to an agency is "established" for purposes of FACA only if the agency itself actually forms the committee, see *id.* at 456-457, and that an agency "utilizes" a panel

created by a private entity only if the panel receives federal funds and is subject to "strict management by agency officials." *Id.* at 457-458. The "strict management or control" test applied by the court of appeals here (Pet. App. A11-A15) and in its earlier cases thus is rooted directly in this Court's decision in *Public Citizen.*

This Court, moreover, has previously denied certiorari in cases in which petitions similarly challenged the court of appeals' application of its "strict management or control" test to committees whose work product was used by agencies, but which were created by private contractors or other entities not themselves subject to FACA. See *National Academy of Sciences* v. *Animal Legal Defense Fund*, 522 U.S. 949 (1997); *Food Chem. News, Inc.* v. *Benson*, 498 U.S. 846 (1990).

c. In amendments to FACA in the years since *Food Chemical News*, moreover, Congress has made no effort to change the court's "strict management or control" test for applying FACA to private contractors. Indeed, as petitioner notes (Pet. 8, 15), in 1997, Congress amended FACA to establish a special test for FACA's application to committees created by quasi-public entities, the National Academy of Sciences and the National Academy of Public Administration. See 5 U.S.C. App. § 15 (Supp. IV 1998). Congress, however, carefully limited its amendment to committees created by the two named, quasi-public entities, thus leaving intact established precedent governing FACA's applicability to committees created by private contractors. See *Faragher* v. *City of Boca Raton*, 524 U.S. 775, 804 n.4 (1998) (where Congress has amended some provisions of a statute, "[t]he decision of Congress to leave [an established judicial interpretation of the statute] intact is conspicuous").

2. a. The court of appeals' decision thus created no new law; it simply applied settled law to the facts of this case. The majority and dissenting opinions both focused on the record evidence about the connection between EPA and the Eastern panel, not on what the appropriate legal standard should be. See Pet. App. A12-A15; see also *id.* at A16 (dissent acknowledges that "the case is close"), A17 (same). Indeed, the crux of petitioner's argument is a disagreement not with the court of appeals' standard, but with its case-specific determination that the quantum of management and control exercised by EPA here was insufficient to demonstrate that EPA utilized the Eastern panel. See Pet. 13, 18-24. That fact-bound application of established law to a particular case, however, does not merit this Court's review.[2]

b. The court of appeals' decision that EPA neither established nor utilized the Eastern panel, moreover, was correct. As an initial matter, the peer-review panel was formed by a private contractor—Eastern—not by EPA. It thus was not "established" by EPA within the meaning of FACA. See *Public Citizen*, 491 U.S. at 458.

Nor was the peer-review group "utilized" by EPA, for three reasons. First, "[c]ontrary to [petitioner's] contention, the record shows that [Eastern] in fact actually managed and controlled the selection of the panel's membership." Pet. App. A14.[3]

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[2] See *Boag* v. *MacDougall*, 454 U.S. 364, 368 (1982) (Rehnquist, J., dissenting) ("[W]e must never forget that this Court is not a forum for the correction of errors."); *Watt* v. *Alaska*, 451 U.S. 259, 277 n.5 (1981) (Stevens, J., concurring) ("[O]ur certiorari jurisdiction is designed to serve purposes broader than the correction of error in particular cases.").

[3] In contending otherwise (Pet. 16 n.16, 21), petitioner misapprehends EPA's role regarding the composition of the peer-

Second, Eastern conducted and oversaw the panel's sole meeting. As petitioner (who attended and participated in the meeting) admits in his declaration, "[t]he meeting was managed by a contractor, [Eastern]. Although several EPA employees who had been involved in developing the draft benzene update attended the meeting and effectively participated . . ., no EPA employee or officer supervised the conduct of the meeting." Pet. App. A3-A4; accord, *e.g.*, C.A. App. 219 (Schalk Decl., ¶ 6) ("[Eastern] directed and managed the peer review meeting").

Third, Eastern bore sole responsibility for collecting the panel members' views and preparing a report of the panel's proceedings. Pet. App. A14. Under those circumstances, EPA did not exercise strict management or control of the peer-review panel. See *Food Chem. News*, 900 F.2d at 333 (holding that, where a private contractor selected and convened an expert panel to provide outside analysis of an agency matter, was in charge of the panel's meetings, and was responsible for

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review panel. Although EPA supplied Eastern with a list of potential members with known expertise (Pet. App. A2-A3), Eastern was not required to select the panel from that list, and, in fact, Eastern instead selected two of the six panel members, including the chair, from its own consultant database. *Id.* at A3. Similarly, while the contract reserved to EPA the final right to approve the composition of the panel as selected by Eastern, *ibid.*, EPA had no authority itself to select the members. Moreover, petitioner overlooks that, as a practical matter, EPA reserved authority to approve the contractor's selection of panel members in this case in order to ensure that the panel would be properly qualified to do the job. As a matter of prudent contract management, it would be irresponsible for EPA to enter into a contract like this one and automatically bind itself in advance to accept whatever group of "experts" the contractor, acting on its own, happened to select.

preparing a report of the panel's proceedings for the agency, the panel was not subject to the agency's management and control, and thus was neither "established" nor "utilized" by the agency within the meaning of FACA).

Contrary to petitioner's contention (Pet. 7-8, 18-20), the ruling below creates no "wholesale contractor exemption" (Pet. 11) to FACA. Rather, the ruling reflects appropriate and close attention to the facts of this particular case, and reaffirms that committees created by private contractors will be subject to FACA if the agency exercises strict management or control over the committee's work. See Pet. App. A11-A15.

3. Finally, there are significant jurisdictional questions in this case. First, petitioner can show no present injury that would give rise to a continuing stake in the issues he raises. It is undisputed that petitioner has obtained all of the panel's documents he sought under FACA and that he attended and freely participated in the panel's only meeting. After EPA provided petitioner the requested documents, it specifically invited him to submit additional comments on the panel's report. Pet. App. A5. It is also undisputed that the panel ceased to exist more than two years ago and thus that petitioner can raise no pending or prospective claims to relief under FACA. Indeed, petitioner has abandoned his claim for injunctive relief and seeks only a declaratory judgment that the federal government violated the law. The only injury identified by the court of appeals was a time delay petitioner faced in obtaining the panel's documents. *Id.* at A7. But FACA sets no precise timetable for the disclosure of documents. See 5 U.S.C. App. § 10(b). Such delay would result in injury, moreover, only if (as the dissent recognized) petitioner could demonstrate that "the documents belatedly

turned over enabled him to poke a hole in the substance of the peer review, a hole that he was unable to perceive on a timely basis because of EPA's original refusal to deliver them. *But he has identified no such gap.*" Pet. App. A16 (emphasis added).

Second, petitioner's alleged injury cannot be redressed by a decision of this Court. As the dissent also recognized (Pet. App. A16), a declaratory judgment that petitioner should have had the documents earlier does nothing to redress that loss. See also *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 106 (1998) (declaratory judgment is "worthless" to eliminate effects of belated compliance with a reporting requirement). The court of appeals predicated standing (Pet. App. A7) on the supposed benefit to petitioner of having a declaration that EPA violated FACA for use in any future Administrative Procedure Act (APA) challenge to a future regulation based on the panel's report. That chain of events is too speculative to confer standing, because it depends not only upon the agency's decision to rely upon the panel report for future regulatory action, but also upon the tenuous assumption that petitioner will have standing to bring an APA challenge to such a rule or regulation. See Pet. App. A16 (petitioner claimed no "threatened injury-in-fact from the outcome of this future proceeding"). If petitioner is actually injured by future agency action, "[a]pplicable rulemaking procedures afford ample opportunity to correct infirmities resulting from improper advisory committee action prior to the proposal." *National Nutritional Foods Ass'n* v. *Califano*, 603 F.2d 327, 336 (2d Cir. 1979). Furthermore, the panel's conclusion that the mere prospect of a future APA suit establishes standing to obtain a declaratory judgment that the government violated the law is in substantial tension

with this Court's consistent admonition that "vindication of the rule of law—the undifferentiated public interest in faithful execution of [federal law] * * * does not suffice" for standing purposes. *Steel Co.*, 523 U.S. at 106.

The dissent below concluded (Pet. App. A16) that standing exists because EPA has a policy of using private contractors to conduct peer reviews and thus the alleged FACA error is likely to recur. But petitioner did not bring a challenge to an EPA policy; he brought a challenge to EPA's use of a particular committee's work product. The complaint focuses exclusively upon the Eastern panel at issue here and seeks relief only with respect to that committee. See C.A. Supp. App. 1-6. Furthermore, this Court recently made clear that the fact that a problem is "capable of repetition" does not by itself supply standing. *Friends of the Earth, Inc.* v. *Laidlaw Env't Servs., Inc.*, 120 S. Ct. 693, 699 (2000). There is, moreover, a substantial question whether such a broad, policy-based cause of action exists under FACA. FACA creates no express cause of action at all and, thus far, this Court has recognized standing only to bring a challenge to a specific committee for which the plaintiff seeks the precise meeting and documentation access rights created by the statute. See *Public Citizen*, 491 U.S. at 449-451.

Third, for similar reasons, the case is practically if not legally moot. Petitioner has obtained all of the meeting access and document disclosures to which FACA entitles him. That EPA might conduct other peer reviews in the future does not avoid the mootness problem, because in addition to showing that the factual nucleus of his claim is "capable of repetition," petitioner must show that it "evad[es] review." *Olmstead* v. *L.C.*, 119 S. Ct. 2176, 2184 n.6 (1999). No showing has been

made that timely raised FACA challenges to future peer review panels cannot be fully litigated. At a minimum, the fact that petitioner's ongoing stake in this matter is, at best, highly attenuated counsels strongly against further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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